Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

OCTOBER TERM, 1994

VIMAR SEGUROS Y REASEGUROS, S.A., PETITIONER

v.

M/V SKY REEFER, HER ENGINES, ETC.,
AND M.H. MARITIMA, S.A., RESPONDENTS

**Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a foreign arbitration clause in a maritime bill of lading is invalid under Section 3(8) of the Carriage of Goods by Sea Act, 46 U.S.C. 1303(8).

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

In addition to petitioner Vimar Seguros y Reaseguros, Bacchus Associates was an appellant in the court of appeals. Vimar has no parent or subsidiaries.

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Petition for a Writ of Certiorari
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PETITION FOR A WRIT OF CERTIORARI

Vimar Seguros y Reaseguros, S.A., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is reported at 29 F.3d 727. The opinion of the district court on the merits (App., *infra*, 14a-26a) is not officially reported but is available at 1993 WL 13743 (D. Mass. 1993), and its opinion certifying the legal issue for immediate appeal under 28 U.S.C. 1292(b) (App., *infra*, 27a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1994. A petition for a writ of certiorari is due on October 5, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 3(8) of the Carriage of Goods by Sea Act, 46 U.S.C. 1303(8), provides:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties or obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect.

2. Section 2 of the Federal Arbitration Act, 9 U.S.C. 2, provides in pertinent part;

> A written provision in any maritime transaction * * * to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT

A. Statutory Framework

The Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. § 1300 *et. seq.*, was enacted in 1936 "to define by law the rights and liabilities of water carriers and shippers in foreign commerce." *See Uniform Ocean Bills of Lading — Hague Rules*, H.R. Rep. No. 2218, 74th Cong., 2d Sess. 1 (1936). Modeled on the International Convention for the

Verification of Certain Rules of Law Relating to Bills of Lading (the "Hague Rules"), COGSA prescribes both the rights and responsibilities of common carriers (the companies that own and operate the ocean-going vessels that carry cargo for hire), and the rights and responsibilities of shippers and consignees (the companies that own the cargo shipped on board the carriers' vessels).

The statute establishes a carefully-crafted balance of rights and duties. On the one hand, COGSA imposes on the carrier the nondelegable obligation "to exercise due diligence to * * * [m]ake the vessel seaworthy" before and at the beginning of the voyage (46 U.S.C. 1303(1)), and to "properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried" (46 U.S.C. 1303(2)). On the other hand, the statute immunizes the carrier from liability for losses resulting from numerous causes (46 U.S.C. 1304(2)(a) through (q)), including, for example, the "[a]ct, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship" (46 U.S.C. 1304(2)(a)), or "[f]ire, unless caused by the actual fault or privity of the carrier" (46 U.S.C. 1304(2)(b)). The statute also limits a carrier's liability to $500 per package or customary freight unit unless the cargo owner declares the value of the cargo in advance. 46 U.S.C. 1304(5).

COGSA also regulates "bills of lading" — the documents that evidence the transportation contract between the carrier and the cargo owner.[1] By its terms, COGSA applies to

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[1] A bill of lading is typically a single-page form document that the carrier or its agent issues to the shipper at the port of loading. See, *e.g.*, Court of Appeals Appendix ("C.A. App.") A44-A45. It acknowledges the carrier's receipt of the cargo for transportation to a designated port of discharge at an agreed freight rate. It is frequently a negotiable document of title issued to order, which the shipper negotiates to its buyer incident to the

"[e]very bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade * * *." 46 U.S.C. 1300. Because bills of lading had historically contained various clauses designed to insulate the carrier from any liability for cargo damage — in conflict with COGSA — the statute sought to make bills of lading simple and uniform,[2] and — more pertinently — it sought to restrict a carrier's ability to avoid liability by inserting limiting conditions in the bill of lading.[3] Toward that end, Section 3(8) of COGSA, 46 U.S.C. 1303(8), specifically invalidates

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sale of the goods. It is also the contract of carriage between the carrier and the shipper (and subsequent holders of the bill of lading). The buyer or its consignee takes delivery of the goods from the carrier at the port of discharge after it returns the bill of lading to the carrier or its agents. The reverse side of the bill of lading typically contains numerous boilerplate terms imposed unilaterally by the carrier. See generally *Organes Enter. Inc.* v. *M/V Khalij Frost*, No. 88 Civ. 4710, 1989 WL 37660 (S.D.N.Y. April 12, 1989).

[2] As the House report explained:

> The uniformity and simplification of bills of lading will be of immense value to shippers who will be relieved of the necessity of closely examining all bills of lading to determine the exceptions contained therein to ascertain their rights and responsibilities; to underwriters who insure the cargo and are met with the same difficulties; and to bankers who extend credit upon the bills of lading.

Uniform Ocean Bills of Lading — Hague Rules, H.R. Rep. No. 2218, 74th Cong., 2d Sess., 7 (1936).

[3] See Note, *Arbitration Clauses: Potential Conflicts With the Carriage of Goods By Sea Act* ("*Arbitration Clauses*"), 21 Colum. J. Transnat'l L. 157 (1982).

any bill-of-lading clause that lessens the carrier's liability under COGSA:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect.

B. The Present Controversy

1. Petitioner, a Spanish insurance company, is the subrogated cargo underwriter of Bacchus Associates, a New York partnership and a wholesale distributor of fruit in New England.[4] In February 1991, Bacchus contracted with a Moroccan supplier, Galaxie Negoce S.A. ("Galaxie"), to buy a shipload of Moroccan oranges, and chartered the M/V Sky Reefer, a refrigerated cargo ship, to transport the fruit from Morocco to New England. The Sky Reefer is owned by respondent Maritima, a Panamanian corporation that is affiliated with certain Japanese shipping companies that chartered, operated, and managed the vessel.[5]

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[4] Petitioner issued to Bacchus a policy of marine cargo insurance that insured Bacchus against loss or damage to its goods. Bacchus submitted a claim for the damaged fruit in question to petitioner under that insurance policy and petitioner became subrogated to Bacchus' rights against respondents when it paid the major part of Bacchus' claim (in the sum of $733,442.90). C.A. App. A8, A37-A38.

[5] Respondent Maritima, the vessel owner, initially time-chartered the Sky Reefer on a 3-year basis to Honma Senpaku Co., Ltd. ("Honma"), of Tokyo. C.A. App. A46-A55. Honma in turn chartered the vessel to Gyogyo Kaisha, Ltd. ("Nichiro Gyogyo"), of Tokyo (*id.* at A56-A65), which thereafter hired

At the time the oranges were placed on board the Sky Reefer, local agents acting for the vessel's manager, Nichiro Corporation ("Nichiro"), a Japanese corporation based in Tokyo, issued a bill of lading to Galaxie, the shipper, stating that 2,058 pallets of oranges had been shipped on board the vessel from Agadir to New Bedford, Massachusetts. The bill of lading — reflecting the contract of carriage between petitioner and respondents — was a standard Nichiro form. See C.A. App. A44-A45. Among its boilerplate provisions was a clause requiring that any dispute arising from the carriage of goods be arbitrated in Japan, pursuant to Japanese law (C.A. App. A45):

> 3. **Governing Law and Arbitration**
>
> (1) The contract evidenced by or contained in this Bill of Lading shall be governed by Japanese law.
>
> (2) Any dispute arising from this Bill of Lading shall be referred to arbitration in Tokyo by the Tokyo Maritime Arbitration Commission (TOMAC) of The Japan Shipping Exchange Inc., in accordance with the Rules of TOMAC and any amendments thereto, and the award by the arbitrators shall be final and binding on both parties.

Like virtually all bills of lading, see *supra* pages 3-4 n.1, the Japanese law-and-arbitration clause was not the product of arm's length negotiations between Nichiro's local agents in Agadir and Galaxie, the Moroccan shipper. Nichiro's agents simply signed and delivered the bill of lading to the shipper

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Nichiro Corporation to manage the vessel. Nichiro chartered the vessel to Baccus for the voyage in question. *Id.* at A66-A68.

once the cargo had been loaded on board the vessel. C.A. App. A39 ¶ 15.[6]

The vessel duly sailed from Agadir to New Bedford with the cargo. Once the goods were en route, the shipper tendered the bill of lading to Bacchus, in accordance with the letter of credit opened in the shipper's favor. Upon receiving the bill of lading, Bacchus learned for the first time of the foreign arbitration clause. C.A. App. A39 ¶ 15.

By the time the ship arrived in New Bedford, the pallets of oranges had shifted in the cargo holds, crushing thousands of boxes of oranges, and resulting in a cargo loss in excess of $1 million. The apparent cause of the damage was the crew's failure to lash and brace the stow sufficiently for a trans-Atlantic crossing in mid-winter. C.A. App. A36-A38.

2. On December 20, 1991, petitioner filed suit in the United States District Court for the District of Massachusetts, naming respondent Maritima *in personam* and respondent M/V Sky Reefer *in rem*.[7] Invoking the foreign arbitration

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[6] Although the bill of lading purported to impose Japanese law and arbitration, its drafters recognized that COGSA might well apply nonetheless. The bill of lading stated (C.A. App. A45):

> 19. **Local Clause**
>
> In case this Bill of Lading covers the Goods moving to or from the U.S.A. and it shall be adjudged that the Japanese law does not govern this Bill of Lading, then the provisions of the U.S. Carriage of Goods Act 1936 shall govern before the Goods are loaded on and after they are discharged from the Vessel and throughout the entire time during which the Goods are in the actual custody of the Carrier.

[7] Bacchus was also a plaintiff in the litigation to recover its uninsured loss (approximately $250,000). See C.A. App. A6-

clause in the bill of lading, respondents moved to stay the action pending arbitration in Japan. Petitioner opposed the motion, contending that enforcement of the foreign arbitration clause would "lessen" the carrier's liability within the meaning of Section 3(8) of COGSA. See C.A. App. A35-A40.

The district court granted the motion (App., *infra*, 14a-26a), holding that Section 3(8) does not invalidate foreign arbitration clauses in maritime bills of lading. The court explained (*id.* at 18a) that Section 3(8) must give way to the Federal Arbitration Act, which "specifically refers to bills of lading in defining the types of agreements which might contain valid and irrevocable arbitration clauses." The court recognized (*id.* at 17a) that the Eleventh Circuit had reached the opposite conclusion in *State Establishment for Agricultural Product Trading* v. *M/V Wesermunde*, 838 F.2d 1576, *cert. denied*, 488 U.S. 916 (1988). In the court's view, however, the Eleventh Circuit had acted "without proper regard for the Supreme Court's mandate that lower courts discard their historical distrust of arbitrators, and give effect to private dispute resolution tribunals" (*id.* at 18a).[8]

A10. For purposes of simplicity, we refer only to "petitioner."

[8] The district court thereafter certified the question for immediate appeal under 28 U.S.C. 1292(b) (App., *infra*, 27a-30a). The court explained (*id.* at 28a) that the question whether foreign arbitration clauses violate COGSA "is a question as to which there is substantial ground for difference of opinion." Indeed, the court observed (*ibid.*), "this court's ruling on the issue ran contrary to the decision by the United States Court of Appeals for the Eleventh Circuit in *State Establishment for Agricultural Trading* v. *M/V Wesermunde*, 838 F.2d 1576 (11th Cir. 1988)." Moreover, the court stated (App., *infra*, 28a), the issue presents "a question of statutory interpretation which is not fact-specific" and "involves a serious legal issue, on which courts have disagreed, which doubtless will arise in future cases."

3. The court of appeals affirmed (App., *infra*, 1a-13a). The court acknowledged (*id.* at 6a) that "§ 3(8) has been consistently used by federal courts to invalidate forum selection clauses in bills of lading governed by COGSA." It explained (*id.* at 9a), however, that the courts are "divided" on whether Section 3(8) likewise invalidates foreign arbitration clauses. Explicitly rejecting (*id.* at 10a) the contrary decision of the Eleventh Circuit in *Wesermunde*, the court of appeals elected to "join those courts upholding the validity of foreign arbitration clauses in bills of lading subject to COGSA" (*ibid.*).

Significantly, the court of appeals "recognize[d] * * * that absent the FAA, COGSA might operate to nullify foreign arbitration clauses in bills of lading" (App., *infra*, 10a n.5). The court surmised, however, that COGSA and the FAA were in "conflict" (*id.* at 11a), and it therefore applied "two canons of statutory interpretation" (*ibid.*) to resolve the conflict it perceived. First, the court noted, "a later enacted statute generally limits the scope of an earlier statute if the two laws conflict"; under that principle, "the FAA must be given priority over COGSA in light of the FAA's reenactment in 1947, eleven years after COGSA was passed." *Id.* at 11a-12a. Second, the court stated, "where two statutes conflict, * * * the specific statute ordinarily controls the general"; and under that principle, the FAA must again take precedence, since it "specifically validates arbitration clauses contained in maritime bills of lading," whereas Section 3(8) of COGSA "makes no reference to arbitration, or for that matter, forum selection clauses." *Id.* at 12a. In light of these statutory maxims — coupled with "the strong federal policy favoring arbitration" (*ibid.*) — the court held that "the FAA alone governs the validity of arbitration clauses, both foreign and domestic, and consequently removes them from the grasp of COGSA" (*id.* at 10a).

REASONS FOR GRANTING THE PETITION

The court of appeals has decided an important and recurring question of federal maritime law. Expressly rejecting the contrary decision of the Eleventh Circuit in *State Establishment for Agricultural Product Trading* v. *M/V Wesermunde*, 838 F.2d 1576, *cert. denied*, 488 U.S. 916 (1988), the court of appeals held that a foreign arbitration clause in a bill of lading must be enforced under the Federal Arbitration Act, notwithstanding Section 3(8) of COGSA. Applying two "canons of statutory interpretation" (App., *infra*, 11a), the court held that Section 2 of the FAA "removes" foreign arbitration clauses "from the grasp of COGSA."

The court of appeals' decision creates an untenable circuit conflict, depriving maritime businesses of the uniformity that is so essential to their commercial relations. The decision below is also deeply flawed. It rests on a faulty construction of both the FAA and COGSA. It unjustifiably abandons settled case law under Section 3(8). And if left undisturbed, it will undermine the fundamental purpose of COGSA: to promote "[t]he uniformity and simplification of bills of lading" in order to "relieve[]" shippers "of the necessity of closely examining all bills of lading to determine the exceptions contained therein to ascertain their rights and responsibilities." *Uniform Ocean Bills of Lading — Hague Rules*, H.R. Rep. No. 2218, 74th Cong., 2d Sess. 7 (1936). Further review is warranted.

A. The Court of Appeals' Decision Is Squarely In Conflict With The Eleventh Circuit's Decision In *Wesermunde*

As the court of appeals acknowledged (App., *infra*, 6a (emphasis added)), "§ 3(8) has been consistently used by federal courts to invalidate *forum selection* clauses in bills of

lading governed by COGSA."[9] These courts have recognized that "[a] clause making a claim triable only in a foreign court would almost certainly lessen liability * * * ." *Indussa Corp.* v. *S.S. Ranborg*, 377 F.2d 200, 203 (2d Cir. 1967) (invalidating bill-of-lading clause requiring suit against Norwegian carrier in Norway).[10] As Judge Friendly explained for the en banc court in *Indussa*, "[e]ven when the

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[9] See *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 604 (1991) (Stevens, J., dissenting) ("The Courts of Appeals, construing * * * the Carriage of Goods by Sea Act * * * have unanimously held invalid as limitations on liability forum-selection clauses requiring suit in foreign jurisdictions").

[10] Accord *Hughes Drilling Fluids* v. *M/V Luo Fu Shan*, 852 F.2d 840 (5th Cir. 1988) (invalidating bill-of-lading clause requiring suit against Chinese carrier in China), *cert. denied*, 489 U.S. 1033 (1989); *Conklin & Garrett, Ltd.* v. *M/V Finnrose*, 826 F.2d 1441, 1142-1144 (5th Cir. 1987) (invalidating bill-of-lading clause requiring suit against Finnish carrier in Finland under Finnish law); *Union Ins. Soc. of Canton, Ltd.* v. *S.S. Elikon*, 642 F.2d 721, 723-725 (4th Cir. 1981) (invalidating bill-of-lading clause requiring suit against German carrier in Germany under German law); *Underwriters at Lloyd's of London* v. *M/V Steir*, 773 F. Supp. 523 (D.P.R. 1991) (invalidating bill-of-lading clause requiring suit against French carrier in France); *C.A. Seguros Orinoco* v. *Naviera Transpapel, C.A.*, 677 F. Supp. 675 (D.P.R. 1988) (invalidating bill-of-lading clause requiring suit against Venezuelan carrier in Venezuela); *Mitsui & Co., Ltd.* v. *M/V Glory River*, 464 F. Supp. 1314 (W.D. Wash. 1978) (invalidating bill-of-lading clause requiring suit against Japanese carrier in Tokyo under Japanese law); *Northern Assurance Co., Ltd.* v. *M/V Caspian Career*, 1977 A.M.C. 421 (N.D. Cal. 1977) (invalidating bill-of-lading clause requiring suit against Japanese carrier in Tokyo under Japanese law); *M.G. Chem. Corp.* v. *M/V Sun Castor*, 1978 A.M.C. 1756 (D. Alaska 1977) (invalidating bill-of-lading clause requiring suit against Japanese carrier in Tokyo).

foreign court would apply [COGSA or the Hague Rules], requiring trial abroad *might* lessen the carrier's liability since there could be no assurance that it would apply them in the same way as would an American tribunal subject to the uniform control of the Supreme Court, and § 3(8) can well be read as covering a potential and not simply a demonstrable lessening of liability." 377 F.2d at 203-204 (emphasis in the original). Put squarely: "'It is entirely unrealistic to look to an obligation to sue overseas as not "lessening" the liability of the carrier.'" *Conklin & Garrett, Ltd.* v. *M/V Finnrose*, 826 F.2d 1441, 1444 (5th Cir. 1987) (quoting G. Gilmore & C. Black, *The Law of Admiralty*, 146 (1975)).[11]

For precisely those reasons, the Eleventh Circuit, in *State Establishment for Agricultural Product Trading* v. *M/V Wesermunde*, 838 F.2d 1576, *cert. denied*, 488 U.S. 916 (1988), held that Section 3(8) invalidates foreign *arbitration* clauses, just as it does foreign *forum selection* clauses. The plaintiff in that case brought an action in federal court arising from the loss of a cargo of eggs on board the M.V. Wesermunde in Tampa, Florida, for delivery to Aqaba, Jordan. Relying on the terms of the bill of lading, defendants moved to stay the litigation pending arbitration in London, England. The district court granted the motion, but the court of appeals reversed, holding that Section 3(8) of COGSA invalidated the foreign arbitration clause incorporated in the bill of lading.

The court of appeals explained that COGSA was "intended to reduce uncertainty concerning the responsibilities and liabilities of carriers, the responsibilities and rights of shippers, and the liabilities of underwriters who insure

[11] In *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972), this Court sustained a forum selection clause in a towage contract, but expressly noted that COGSA was "not applicable in this case." *Id.* at 10 n.11.

waterborne cargo." 838 F.2d at 1580. "By strictly circumscribing the ability of carriers to avoid liability on cargoes in their care, COGSA also greatly enhances the negotiability of bills of lading." *Ibid.* Toward that end, the court pointed out, COGSA "void[s] overreaching clauses inserted by carriers in their bills of lading that unreasonably limit the carrier's liability or obstructs the freight claimant's ability to secure redress." *Ibid.* For example, the court noted, foreign *forum selection* clauses have been uniformly rejected under COGSA "because such provisions, as a practical matter, tend to lessen the liability of the carrier, particularly where the claim is small." *Id.* at 1580-1581.

The court held that COGSA likewise invalidates foreign *arbitration* clauses in maritime bills of lading. To be sure, the court noted, arbitration as such does not violate COGSA, "in light of Congress' encouragement of arbitration by its enactment of the Arbitration Act, 9 U.S.C. §§ 1-14 (1970)." 838 F.2d at 1581. The court held, however, that "a provision requiring arbitration in a *foreign* country that has no connection with either the performance of the bill of lading contract or the making of the bill of lading contract is a provision that would conflict with COGSA's general purpose of not allowing carriers to lessen their risk of liability." *Ibid.*

Had the present case arisen in the Eleventh Circuit, the motion to stay the action pending arbitration in Japan would assuredly — as in *Wesermunde* — have been denied. Here, as in *Wesermunde*, neither the performance of the bill of lading, nor the making of the contract, took place in the foreign jurisdiction. The bill of lading was issued in Agadir by respondent's Moroccan agents to a Moroccan shipper and listed Bacchus as the consignee. The performance of the contract, involving a voyage from Northern Africa to the United States, as well as the contract of sale, involving goods sold by a Moroccan exporter to a New England fruit merchant, had nothing to do with Japan. Japan was simply the home of Nichiro, the vessel's liability insurers, and the

vessel's crew. Under Section 3(8), as construed by the Eleventh Circuit in *Wesermunde*, the foreign arbitration clause would be invalid.

The court below, however, expressly rejected *Wesermunde*, preferring to "join those courts upholding the validity of foreign arbitration clauses in bills of lading subject to COGSA." App., *infra*, 10a. Like the trial court — which chastised the Eleventh Circuit for acting "without proper regard for the Supreme Court's mandate that lower courts discard their historical distrust of arbitrators, and give effect to private dispute resolution tribunals" (*id.* at 18a) — the court of appeals cast its lot with the "numerous federal courts [that] have upheld foreign arbitration clauses in bills of lading subject to COGSA" (*id.* at 10a). As the district court recognized (*id.* at 28a), the question presented thus "involves a serious legal issue, on which courts have disagreed, which doubtless will arise in future cases."[12]

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[12] As the court of appeals acknowledged (App., *infra*, 9a-10a), the conflict between the First and Eleventh Circuits is symptomatic of a broader disagreement among the many district courts that have addressed the issue. Compare *Organes Enter., Inc.* v. *M/V Khalij Frost*, No. 88 Civ. 4710, 1989 WL 37660 (S.D.N.Y. April 12, 1989) (invalidating foreign arbitration clause); *Siderius, Inc.* v. *M.V. "Ida Prima"*, 613 F. Supp. 916 (S.D.N.Y. 1985) (same); *Pacific Lumber & Shipping Co., Inc.* v. *Star Shipping A/S*, 464 F. Supp. 1314 (W.D. Wash. 1979) (same) with *Citrus Marketing Bd. of Israel* v. *M/V Ecuadorian Reefer*, 754 F. Supp. 229 (D. Mass. 1990) ((enforcing foreign arbitration clause); *Nissho Iwai American Corp.* v. *M/V Sea Bridge*, No. Civ.A.R-90-1238, 1991 WL 182117, at *7 (D. Md. April 25, 1991) (same); *Travelers Indem. Co.* v. *M/V Mediterranean Star*, No. 86 Civ. 8797, 1988 WL 78363 (S.D.N.Y. July 19, 1988) (same); *Mid South Feeds, Inc.* v. *M/V Aqua Marine*, 1988 A.M.C. 437, 439-440 (S.D. Ga. 1986) (same); *Kaystone Chemical, Inc.* v. *Bow-Sun*, No. 88 Civ. 5859, 1989 WL 39498, at *4 (S.D.N.Y. April 19, 1989) (same) (citing

The result is a patchwork of conflicting decisions, in both the circuit and district courts — some upholding, some rejecting, foreign arbitration clauses. While such a lack of uniformity may be tolerable in some industries, it poses substantial difficulties for maritime commerce. The typical maritime transaction subject to COGSA — "to or from ports of the United States" (46 U.S.C. 1300) — involves many different domestic jurisdictions, any one of which could become the forum for a lawsuit. The present case illustrates the point: Bacchus is a New York partnership, with distribution points throughout New England, and which took possession of the goods in Massachusetts. Here, as in most COGSA cases, there may be a range of possible venues, each with its own approach to foreign arbitration clauses in bills of lading.

Maritime businesses should not have to speculate at their peril whether the selected forum will (like the Eleventh Circuit) enforce Section 3(8) — or, instead, like the court below, conclude that the FAA "removes" such provisions "from the grasp of COGSA" (App., *infra*, 10a).[13] Rather, as this Court explained in *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 402 (1970), "federal admiralty law should be 'a system of law coextensive with, and operating

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cases); *Fakiah Poultry Farms* v. *M/V Mulhiem*, No. 85 Civ. 2657 (WCC), 1986 WL 12534 (S.D.N.Y. Oct. 24, 1986) (same); *Mitsubishi Shoji Kaisha Ltd.* v. *MS Galini*, 323 F. Supp. 79, 82-84 (S.D. Tex. 1971) (same). Although the issue has, to date, provoked only two (conflicting) court of appeals decisions, that is doubtless because, pursuant to 9 U.S.C. 16(b)(1), an order granting a stay pending arbitration is not subject to interlocutory review except (as in this case) upon certification under 28 U.S.C. 1292(b).

[13] Nor, for that matter, should businesses be permitted to obtain the benefit of a more favorable rule of law simply by engaging in strategic "forum shopping."

uniformly in, the whole country.'" Indeed, it was the very purpose of COGSA to take the guesswork out of bills of lading, on the premise that promoting "[t]he uniformity and simplification of bills of lading [would] be of immense value to shippers who will be relieved of the necessity of closely examining all bills of lading to determine the exceptions contained therein to ascertain their rights and responsibilities." *Uniform Ocean Bills of Lading — Hague Rules*, H.R. Rep. No. 2218, 74th Cong., 2d Sess. 7 (1936). The conflict between the First and Eleventh Circuits frustrates that congressional purpose. Further review is warranted.

B. The Decision Below Is Wrong

The decision of the court of appeals is flawed in three fundamental respects. First, the court created an indefensible dichotomy between foreign *forum selection* clauses (which the court conceded are invalid under COGSA) and foreign *arbitration* clauses (which the court upheld), insisting on a distinction without a difference. Second and relatedly, by sustaining foreign arbitration clauses the court effectively gutted the basic protections afforded by COGSA. Finally, the court of appeals' rationale for its decision — that COGSA and the FAA are irreconcilably in "conflict" (App., *infra*, 11a), and that "canons of statutory interpretation" are therefore required to select a winner — is entirely mistaken.

1. As noted above (*supra* page 10), the court of appeals itself conceded (App., *infra*, 6a (emphasis added)) that "§ 3(8) has been consistently used by federal courts to invalidate *forum selection* clauses in bills of lading governed by COGSA." The rationale is plain: "'It is entirely unrealistic to look to an obligation to sue overseas as not "lessening" the liability of the carrier.'" *Conklin & Garrett, Ltd.* v. *M/V Finnrose*, 826 F.2d 1441, 1444 (5th Cir. 1987) (quoting G. Gilmore & C. Black, *The Law of Admiralty*, 146 (1975)). By compelling a buyer, like petitioner, to litigate its rights in a foreign courthouse, typically under foreign law, and

invariably as a result of a unilaterally-imposed term, a forum selection clause imposes substantial, often overwhelming, obstacles to the enforcement of COGSA rights.

Foreign arbitration clauses have the same effect: they, too, require resort to an overseas forum, typically governed by foreign law.[14] As one commentator has asked rhetorically: "If [a] court will not validate a choice of forum clause that requires suit abroad, why should an arbitration clause requiring the same thing be any different?" Note, *Arbitration Clauses*, 21 Colum. J. Transnat'l L. at 168. And even were COGSA rules applicable in the foreign arbitration, "there could be no assurance that [the foreign arbitrator] would apply them in the same way as would an American tribunal subject to the uniform control of the Supreme Court * * *." *Indussa Corp.* v. *S.S. Ranborg*, 377 F.2d 200, 203-204 (2d Cir. 1967) (en banc).

But while COGSA principles should logically invalidate *both* foreign forum selection and foreign arbitration clauses, the court of appeals has effectively created a distinction between the two. By its lights, if a carrier imposes a foreign *litigation* requirement, COGSA will govern and invalidate the clause. But should the carrier impose foreign *arbitration*, the result (in the First Circuit) will be just the opposite. Section

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[14] In the present case, for example, the arbitration proceedings in Japan would be governed not by COGSA but by the Japanese Hague Rules, according to respondent's own expert. See C.A. App. A41-A42 (affidavit of Seiichi Nakamura). That would have severe consequences for petitioner: unlike COGSA, which by judicial construction imposes on the carrier a *non-delegable* obligation to load and stow the cargo properly (46 U.S.C. 1303(2)), the comparable provision in the Japanese Hague Rules purports to impose the duty to load and stow only on the carrier and its employees — and thus would appear not to cover this case, in which the stevedores who loaded and stowed the boxes of oranges in Morocco were hired by Galaxie, the shipper.

3(8) makes no such distinction on its face, nor does any such distinction make sense.

2. What is more, by preempting COGSA — by holding that the FAA "removes" foreign arbitration clauses "from the grasp of COGSA" (App., *infra*, 10a) — the court of appeals has undermined the purposes of the statute. COGSA "was intended to reduce uncertainty concerning the responsibilities and liabilities of carriers, the responsibilities and rights of shippers and the liabilities of underwriters who insure waterborne cargo." *Union Ins. Soc. of Canton, Ltd.* v. *S.S. Elikon*, 642 F.2d 721, 723 (4th Cir. 1981). "By strictly circumscribing the ability of carriers to avoid liability on cargoes in their care, COGSA also greatly enhances the negotiability of bills of lading." *Ibid.* And while "'COGSA allows a freedom of contracting out of its terms,'" it does so "'only in the direction of *increasing* the shipowner's liability, and never in the direction of diminishing them. This apparent onesidedness is a commonsense recognition of the inequality in bargaining power which * * * COGSA [was] designed to redress * * *.'" *Conklin & Garrett, Ltd.* v. *M/V Finnrose*, 826 F.2d 1441, 1443-1444 (5th Cir. 1987) (quoting G. Gilmore & C. Black, *The Law of Admiralty* 146 (1975)).

The court of appeals' decision cannot be squared with these fundamental purposes. Following the court's lead, a carrier could oust an American court from the jurisdiction conferred by COGSA simply by providing, in the bill of lading, for *arbitration*, not *litigation*, overseas. And for carriers, that result is easily accomplished — since a bill of lading is not an arms-length agreement, but rather is imposed, unilaterally, by the carrier. With a single stroke of fine print, the carrier could — and, in light of the decision below, inevitably will — deprive purchasers of their COGSA rights.[15]

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[15] In this critical respect, foreign arbitration clauses in bills of lading differ from the forum selection clauses that the Court upheld in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972), and *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585 (1991). In *Bremen*, the Court found "strong evidence that the forum clause was a vital part of the agreement" between the parties, and that "it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations." 407 U.S. at 14. Moreover, although the ticket purchasers in *Carnival Cruise* did not negotiate the terms of the forum selection clause (see 499 U.S. at 593), they nevertheless "were given notice of the forum provision and, therefore, presumably retained the option of rejecting the contract with impunity" (*id.* at 595). Here, by contrast, petitioner learned of the foreign arbitration clause only when the bill of lading was presented by the shipper. See C.A. App. A39. By that point, the goods were already en route to New Bedford.

There is no basis for that result. Foreign arbitration, no less than foreign litigation, "puts a high hurdle in the way of enforcing" the shipper's rights. G. Gilmore & C. Black, *The Law of Admiralty*, 146 (1975). And as the leading treatise explains, COGSA "makes it plain that *no* provisions directly or indirectly disadvantaging the shipper were to be permitted." *Ibid.* (emphasis added).

Not only does the decision below gut the pro-shipper "onesidedness" intended by COGSA (*Conklin & Garrett, Ltd.*, 826 F.2d at 1444); it also introduces significant "uncertainty concerning the responsibilities and liabilities of carriers, the responsibilities and rights of shippers and the liabilities of underwriters who insure waterborne cargo" (*Union Ins. Soc. of Canton, Ltd.*, 642 F.2d at 723). Under the court of appeals' decision, the rights and liabilities of the parties would depend entirely upon the rules and procedures of the foreign jurisdiction. That is precisely what Congress sought to avoid by enacting COGSA.

3. Even the court of appeals seemed to appreciate these difficulties with its analysis. As it grudgingly conceded, "absent the FAA, COGSA might operate to nullify foreign arbitration clauses in bills of lading." App., *infra*, 10a n.5. It concluded, however, that COGSA and the FAA are in "conflict" and that "canons of statutory interpretation" were therefore required to decide between them. App., *infra*, 11a.

That was mistaken. "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). Accord *County of Yakima* v. *Confederated Tribes and Bands of the Yakima Indian Nation*, 112 S. Ct. 683, 692 (1992). Courts must therefore "read federal statutes 'to give effect to each if [they] can do so while preserving their sense and purpose.'" *Pittsburgh & Lake Erie R. Co.* v. *Railway Labor Executives' Ass'n*, 491 U.S. 490, 510 (1989). The "cardinal principle," this Court has explained, is "to give effect to both [statutes] if possible." *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939).

Section 2 of the FAA is easily reconcilable with Section 3(8) of COGSA. By its terms, Section 2 provides for the enforceability of arbitration clauses "save upon such grounds as exist at law or in equity for the revocation of any contract." One such "ground" is when the contract violates some other statute (such as COGSA): "The general rule of law is that a contract made in violation of a statute is void." *Miller* v. *Ammon*, 145 U.S. 421, 426 (1892). As this Court explained fully 100 years ago, "it has never been doubted that, as a general rule, a contract made in contravention of a statute is void and cannot be enforced." *Burck* v. *Taylor*, 152 U.S. 634, 649 (1894). Accord *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, 548 (1902).

As even the court of appeals seemed to recognize (App., *infra*, 10a n.5), COGSA — at least "absent the FAA" — would invalidate the foreign arbitration clause in this case. It follows that, under the "saving" provision of Section 2 of the FAA, the foreign arbitration clause is *not* enforceable. In short, COGSA and the FAA "are capable of co-existence," and it was therefore "the duty" of the court below "to regard each as effective." *Morton*, 417 U.S. at 551.

The court failed to discharge that duty. Instead, it played one statute off against the other, invoking principles of statutory construction designed to select among "conflicting" statutes. It should not have done so.[16]

C. The Question Presented Is One Of Recurring Importance To The Maritime Industry

The bill of lading is a centerpiece of international commerce. Goods of all sorts are bought and sold the world over on the basis of negotiable bills of lading and other commercial documents. Sellers typically satisfy their obligations to their buyers by tendering to the buyer (or its bank) an endorsed bill of lading attesting that the goods are en

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[16] Even at the task it undertook, the court of appeals erred. To begin with, we do not agree that Section 2 of the FAA is a "more specific statute" than Section 3(8) of COGSA. App., *infra*, 12a. *Both* statutes deal expressly with maritime contracts, and COGSA deals more particularly with contracts for the carriage of goods — precisely the kind of contract at issue in this case. Moreover, the reenactment of the FAA eleven years after the enactment of COGSA is not necessarily illuminating, in light of the "cardinal principle of construction that repeals by implication are not favored" (*United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939)). The point is mooted in any event by the fact that Section 2 of the FAA carves out an explicit exception for "such grounds as exist at law or in equity for the revocation of any contract" — which, in this case, includes the violation of Section 3(8) of COGSA.

route. The bill of lading thereby evidences both the buyer's ownership of the goods and its contract with the carrier if the goods are lost or damaged.

The fundamental premise of COGSA is that bills of lading should be easily, and predictably, enforceable. See *Union Ins. Soc. of Canton, Ltd.* v. *S.S. Elikon*, 642 F.2d 721, 723-725 (4th Cir. 1981). Central to such enforceability is the availability of a convenient forum in which controlling law will be recognized and applied. By governing *all* contracts of carriage for goods touching United States ports, COGSA enables businessmen engaged in the foreign commerce of the United States to buy and sell goods confident that their COGSA rights will not be infringed by bill-of-lading terms that lessen those rights — including terms that require foreign arbitration, typically (as here) under foreign law.

The opinion of the court of appeals frustrates those statutory purposes. It encourages carriers to impose arbitration terms that strip American courts of jurisdiction, in favor of foreign jurisdictions that bear little, if any, connection to the underlying transaction (as is the case here). It forces cargo owners — faced with unilaterally-imposed, boilerplate provisions — to submit to foreign arbitrations they never agreed to, in countries where it will be costly and difficult, if not impossible, for them to assert their claims effectively. It practically forecloses the assertion of small claims in foreign proceedings where costs would be disproportionate to the amount in dispute.[17] Indeed, even large claims may be abandoned; and cargo premiums will

[17] Accord Black, *The Bremen, COGSA and the Problem of Conflicting Interpretation*, 6 Vand. J. Transnat'l L. 365, 369 (1973) ("On most moderate-sized claims, remission to the foreign forum is a practical immunization of the carrier from liability").

doubtless increase, as the right of subrogation (for insurance companies like petitioner) will be materially diluted.

And the problem is only getting worse. As the district court recognized (App., *infra*, 28a), the question presented is one "on which courts have disagreed, which doubtless will arise in furture cases." Indeed, the reported cases alone suggest that foreign law-and-arbitration clauses have been appearing in ocean bills of lading with increasing frequency.[18] The decision below is likely to embolden carriers still further: having lost — and lost *uniformly* — the battle to impose foreign forum selection clauses, carriers will accomplish much the same end through the simple device of foreign arbitration clauses. The legitimate business expectations of more and more cargo owners concerning their bill-of-lading rights will be frustrated by unforeseen, costly

[18] For decisions invalidating foreign arbitration clauses, *see State Establishment for Agric. Prod. Trading* v. *M/V Wesermunde*, 838 F.2d 1576 (11th Cir. 1988), *cert. denied*, 488 U.S. 916 (1988); *Organes Enter., Inc.* v. *M/V Khalij Frost*, No. 88 Civ. 4710, 1989 WL 37660 (S.D.N.Y. April 12, 1989); *Siderius, Inc.* v. *M/V Ida Prima*, 613 F. Supp 916 (S.D.N.Y. 1985); *Pacific Lumber & Shipping Co., Inc.* v. *Star Shipping A/S*, 464 F. Supp. 1314 (W.D. Wash. 1979). For decisions enforcing foreign arbitration clauses, see *Citrus Marketing Bd. of Israel* v. *M/V Ecuadorian Reefer*, 754 F. Supp. 229 (D. Mass. 1990); *Nissho Iwai American Corp.* v. *M/V Sea Bridge*, No. Civ. A. R-90-1238, 1991 WL 182117, at 7 (D. Md. April 25, 1991); *Mid South Feeds, Inc.* v. *M/V Aqua Marine*, 1988 A.M.C. 437, 439-440 (S.D. Ga. 1986); *Kaystone Chemical, Inc.* v. *Bow-Sun*, No. 88 Civ. 5859, 1989 WL 39498, at *4 (S.D.N.Y. April 19, 1989) (citing cases); *Travelers Indem. Co.* v. *M/V Mediterranean Star*, No. 86 Civ. 8797, 1988 WL 78363 (S.D.N.Y. July 19, 1988); *Fakiah Poultry Farms* v. *M/V Mulhiem*, No. 85 Civ. 2657 (WCC), 1986 WL 12534 (S.D.N.Y. Oct. 24, 1986); *Mitsubishi Shoji Kaisha Ltd.* v. *MS Galini*, 323 F. Supp. 79, 82-84 (S.D. Tex. 1971).

arbitrations in vexatious foreign forums. In time, the bill of lading will cease to be the uniform and simple contract of carriage envisioned by Congress.

The Eleventh Circuit got it right in *Wesermunde*: "[A] provision requiring arbitration in a *foreign* country that has no connection with either the performance of the bill of lading contract or the making of the bill of lading contract is a provision that would conflict with COGSA's general purpose of not allowing carriers to lessen their risk of liability." 838 F.2d at 1581. Because the First Circuit has unjustifiably rejected that basic COGSA principle, the petition should be granted and the decision of the court of appeals reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1994

APPENDICES

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 93-2179

VIMAR SEGUROS Y REASEGUROS, S.A.,

PLAINTIFFS, APPELLANTS,

v.

M/V SKY REEFER, HER ENGINES, ETC.,
AND M.H. MARITIMA, S.A.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Mark L. Wolf, *U.S. District Judge]*

Before
Breyer*, *Chief Judge*,
Bownes, *Senior Circuit Judge*,
and Stahl, *Circuit Judge*.

July 7, 1994

*Chief Judge Stephen Breyer heard oral argument in this matter but did not participate in the drafting or the issuance of the panel's opinion. The remaining two panelists therefore issue this opinion pursuant to 28 U.S.C. § 46(d).

BOWNES, *Senior Circuit Judge*. This appeal asks us to decide whether a foreign arbitration clause in a maritime bill of lading governed by the Carriage of Goods at Sea Act, 46

U.S.C. § 1300 *et seq.* (COGSA), is invalid under that statute, or whether such a clause is enforceable under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (FAA). We conclude that the FAA controls, and that the arbitration clause is valid. Accordingly, the order of the district court staying this action pending arbitration in Tokyo is affirmed.

I.

BACKGROUND

Plaintiff-appellant Bacchus Associates is a wholesale fruit distributor in the Northeast United States. Bacchus was the owner of a shipment of oranges travelling from Agadir, Morocco to New Bedford, Massachusetts, in February 1991 aboard the SKY REEFER,[1] a vessel owned by M.H. Maritima, S.A. Maritima had time-chartered the vessel to Honma Senpaku Co., Ltd., who in turn time-chartered it to Nichiro Corp. Bacchus entered into a voyage charter with Nichiro for the February 1991 voyage.

The oranges were shipped under a bill of lading issued in Morocco by Nichiro. The bill of lading constitutes the contract of carriage between Bacchus and Maritima. En route to New Bedford, numerous boxes of oranges were crushed. Bacchus filed an action in the United States District Court for the District of Massachusetts, *in rem* against the SKY REEFER, and *in personam* against Maritima, seeking to recover approximately $1 million in damages.

Maritima moved to stay the action and compel arbitration in Tokyo pursuant to a clause in the bill of lading:

[1] The subrogated underwriter of the oranges, Vimar Seguros Y Reaseguros, is also a plaintiff-appellant in this action. Hereafter, references to Bacchus include Vimar where applicable.

Governing Law and Arbitration

(1) The contract evidenced by or contained in this Bill of Lading shall be governed by Japanese Law.

(2) Any dispute arising from this Bill of Lading shall be referred to arbitration in Tokyo by the Tokyo Maritime Arbitration Commission (TOMAC) at the Japan Shipping Exchange, Inc., in accordance with the Rules of TOMAC and any agreement thereto, and the award given by the arbitrators shall be final and binding on both parties.

The district court held that the arbitration clause contained in subsection (2) was enforceable, granted Maritima's motion for a stay pending arbitration, and certified the following question for interlocutory appeal pursuant to 28 U.S.C. 1292(b) "[W]hether 46 U.S.C. § 1303(8) [§ 3(8) of COGSA] nullifies an arbitration clause contained in a bill of lading governed by COGSA." With this question in mind, we begin our journey through unsettled statutory waters.

II.

DISCUSSION

COGSA was passed in 1936 as the American enactment of the Hague Rules, and was part of an international effort to achieve uniformity and simplicity in bills of lading used in foreign trade. *Union Ins. Soc'y of Canton, Ltd.* v. *S.S. Elikon*, 642 F.2d 721, 723 (4th Cir. 1981). COGSA was also intended to reduce uncertainty concerning the responsibilities and liabilities of carriers, responsibilities and rights of shippers, and liabilities of insurers. *State Establishment for Agric. Prod. Trading* v. *M/V Wesermunde*, 838 F.2d 1576, 1580 (11th Cir.), *cert. denied*, 488 U.S. 916 (1988) ("*Wesermunde*"); *S.S. Elikon*, 642 F.2d at 723; *see generally* Grant Gilmore & Charles L. Black, *The Law of Admiralty* § 3-25 at 145 (2d ed. 1975).

COGSA applies to "[e]very bill of lading . . . which is evidence of a contract for the carriage of goods by sea to or from parts of the United States, in foreign trade . . . ." 46 U.S.C. § 1300. The parties agree that the bill of lading at issue here is covered by COGSA *ex proprio vigore*, in other words, as a matter of law. The bill of lading also contains the following provision:

> **Local Law**
>
> In case this Bill of Lading covers the Goods moving to or from the U.S.A. and it shall be adjudged that the Japanese Law does not govern this Bill of Lading, then the provisions of the U.S. Carriage of Goods at Sea Act 1936 shall govern before the Goods are loaded on and after they are discharged from the vessel and throughout the entire time during which the Goods are in the actual custody of the carrier.

Bacchus argues that the Tokyo arbitration clause is invalid under § 3(8) of COGSA which prohibits the "lessening" of the carrier's obligation as imposed by COGSA's other sections.[2]

In *Indussa Corp.* v. *S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967) (en banc), the Second Circuit held that all foreign forum selection clauses in bills of lading governed by

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[2] This provision provides as follows:

> Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties or obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect.

46 U.S.C. § 1303(8)

COGSA are necessarily invalid under § 3(8) because they tend to lessen the carrier's liability. *Id.* at 204. The court reasoned as follows:

> From a practical standpoint, to require an American plaintiff to assert his claim only in a distant court lessens the liability of the carrier quite substantially, particularly when the claim is small. Such a clause puts "a high hurdle" in the way of enforcing liability, and thus is an effective means for carriers to secure settlements lower than if cargo [sic] could sue in a convenient forum.

Id. at 203.[3] Moreover, "[a] clause making a claim triable only in a foreign court would almost certainly lessen liability if the law which the court would apply was not [COGSA]." *Id.* Furthermore,

> [e]ven when the foreign court would apply [COGSA], requiring trial abroad *might* lessen the carrier's liability since there could be no assurance that it would apply [COGSA] in the same way as would an American tribunal subject to the uniform control of the Supreme Court . . . . We think that Congress meant to invalidate any contractual

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[3] The court also concluded that COGSA, wherever it governs a bill of lading, requires application of American law. *Indussa*, 377 F.2d at 203; *see generally* Thomas J. Schoenbaum, *Admiralty & Maritime Law* § 9-18 at 326-27 (Pra. ed. 1987). Bacchus contends that the Japanese choice-of-law clause in its bill of lading, in addition to the arbitration clause, is null and void under § 3(8) of COGSA, and, alternatively, that the "Local Law" clause in the bill of lading requires that COGSA, and not Japanese law, governs, because COGSA applies *ex proprio vigore*. Although both of these arguments appear to be substantial, only the validity of the arbitration clause is at issue on this interlocutory appeal. In light of our holding, the choice-of-law question must be decided, in the first instance, by an arbitrator.

> provision in a bill of lading for a shipment to or from the United States that would prevent cargo [sic] able to obtain jurisdiction over a carrier in an American court from having that court entertain the suit and apply the substantive rules Congress had prescribed.

Id. at 203-04 (emphasis in original) (citations omitted) (footnote omitted).

Since *Indussa*, § 3(8) has been consistently used by federal courts to invalidate forum selection clauses in bills of lading governed by COGSA. *See, e.g., Conklin & Garrett, Ltd.* v. *M/V Finnrose*, 826 F.2d 1441, 1442-44 (5th Cir. 1987) (forum selection clause designating Finland invalid even where bill of lading provided for application of COGSA in Finland); *Union Soc'y of Canton, Ltd.*, 642 F.2d at 723-25 (choice of forum clause requiring litigation in Germany invalid under § 3(8)); *cf. Fireman's Fund Amer. Ins. Cos.* v. *Puerto Rican Forwarding Co.*, 492 F.2d 1294 (1st Cir. 1974) (distinguishing *Indussa* and upholding New York City forum selection clause). *Indussa* has also been approved by commentators. *See* Gilmore & Black, supra § 3-25 at 145-46 n.23; Schoenbaum, supra § 9-18 at 327; Charles L. Black, *The Bremen, COGSA and the Problem of Conflicting Interpretation*, 6 Vand. J. Trans. L. 365, 368-69 (1973). *But see* Note, Kenneth M. Klemm, *Forum Selection in Maritime Bills of Lading Under COGSA*, 12 Fordham Int'l L.J. 459 (1989); Stephen M. Denning, *Choice of Forum Clauses in Bills of Lading*, 2 J. Mar. L. & Com. 17 (Oct. 1970).

While we need not fully explore the issue, we note that the Supreme Court's recent decision in *Carnival Cruise Lines*, Inc. v. *Shute*, 499 U.S. 585 (1991), in which the Court held that the Limitation of Vessel Owners' Liability Act did not invalidate forum selection agreements, casts some doubt upon *Indussa's* continuing viability. *See Fabrica De Tejidos La Bellota S.A.* v. *M/V Mar*, 799 F. Supp. 546, 560-61 (D.

Virgin Islands 1992); *see also* Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 Wash. L. Rev. 55, 77 (1992) (*Carnival Cruise* implicitly overruled *Indussa* and its progeny). *But see Underwriters at Lloyd's of London* v. *M/V Steir*, 773 F. Supp. 523, 526-27 (D.P.R. 1991) (invalidating forum selection clause under § 3(8) of COGSA, holding that *Indussa* survives *Carnival Cruise*).

Moveover, in *Fireman's Fund* we questioned whether *Indussa* even survived the Supreme Court's decision in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972). In *The Bremen*, the Supreme Court enforced a foreign forum selection clause in a maritime contract not covered by COGSA. In doing so, the Court focused on whether the clause was unreasonable'' under the circumstances. *The Bremen*, 407 U.S. at 10. We remarked as follows:

> Although the Supreme Court has acknowledged the *Indussa* decision and has not formally rejected it, *see The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 10 n.11, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972), several passages in the Bremen opinion cast some doubt on the underlying rationale of *Indussa*. *See, e.g.*, 407 U.S. at 9, 92 S.Ct. at 1912 ("The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.")

Fireman's Fund, 492 F.2d at 1296 n.2. Because *The Bremen* is not a COGSA case, however, it is easily distinguishable from *Indussa* and its progeny. *See S.S. Elikon*, 642 F.2d at 724-25 (holding that *The Bremen* did not involve COGSA and therefore did not disturb *Indussa*).

Notwithstanding the arguably tremulous ground on which *Indussa* and its progeny currently sit, we will assume,

arguendo, that, for the reasons set forth in *Indussa*, foreign forum selection clauses are invalid under § 3(8) of COGSA.

The other statute implicated in this case is the FAA. Section 2 of that act provides:

> A written provision in any maritime transaction . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. "[B]ills of lading of water carriers" are explicitly included as "maritime transactions" under the statute. 9 U.S.C. § 1. Furthermore, the FAA requires a federal district court, on the application of one of the parties, to stay litigation and grant an order compelling arbitration of any issue referable to arbitration under the agreement. *Id.* §§ 3, 4.

Where there is an agreement to arbitrate, the FAA reflects a strong, well-established, and widely recognized federal policy in favor of arbitration. *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 226 (1987); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985); *Securities Indus. Ass'n* v. *Connolly*, 883 F.2d 1114,1118-19 (1st Cir. 1989), *cert. denied*, 495 U.S. 956 (1990). Arbitration agreements are unenforceable under § 2 of the FAA only where the agreement would be revocable under state contract law. *Southland Corp.* v. *Keating*, 465 U.S. 1, 11 (1984) (party may assert general contract defenses, such as fraud and duress, to avoid enforcement of arbitration agreement); *McAllister Bros., Inc.* v. *A & S Transp. Corp.*, 621 F.2d 519, 524 (2d Cir. 1980) (same).[4]

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[4] Bacchus argued below that the bill of lading was a contract of adhesion, and that the arbitration clause was therefore unenforceable. This defense was rejected by the district court, and that ruling is not before us on the present appeal. We recognize, however, that maritime bills of lading have been viewed as contracts of adhesion. *See, e.g., Organes Enters., Inc.* v. *M/V Khalij Frost*, 1989 A.M.C. 1460, 1465-66 (S.D.N.Y. 1989); *Pacific Lumber & Shipping Co.* v. *Star Shipping A/S*, 464 F. Supp. 1314, 1315 (W.D. Wash. 1979). Accordingly, if the adhesion issue had been a subject of this interlocutory appeal, it would warrant close scrutiny.

Although this court has never decided whether a foreign arbitration clause in a bill of lading governed by COGSA is invalid under § 3(8) of that statute, courts that have reached the question are divided. A handful of courts, including the Eleventh Circuit, have employed the reasoning articulated in *Indussa* to invalidate foreign arbitration clauses. *See, e.g., Wesermunde*, 838 F.2d at 1580-82; *M/V Khalij Frost*, 1989 A.M.C. at 1462-66; *Siderius* v. *M.V. Ida Prima*, 613 F. Supp. 916, 920-21 (S.D.N.Y. 1985); *Star Shipping A/S*, 464 F. Supp. at 1314-15; *see also* Gilmore & Black, *supra*, § 3-25 at 146 n.23; Schoenbaum, *supra* § 9-19 at 329.

In *Wesermunde*, the Eleventh Circuit declined to enforce a foreign arbitration agreement contained in a bill of lading governed by COGSA. Relying on *Indussa*, the court explained as follows:

> While we do not believe that arbitration in and of itself is *per se* violative of COGSA's provisions, especially in light of Congress' encouragement of arbitration by its enactment of the Arbitration Act, 9 U.S.C. §§ 1-14 (1970) the court does believe that a provision requiring arbitration in a *foreign* country that has no connection with either the performance of the bill of lading contract or the making of the bill of lading contract is a provision that would conflict

> with COGSA's general purpose of not allowing carriers to lessen their risk of liability.

Wesermunde, 838 F.2d at 1581 (footnote omitted). Some courts have gone one step further, holding that foreign arbitration clauses in bills of lading are *per se* invalid under COGSA because "[t]he considerations [stated in *Indussa*] are substantially similar where the bill of lading requires the consignee to arbitrate in a foreign country." *Siderius*, 613 F. Supp. at 920; *accord Khalij Frost*, 1989 A.M.C. at 1462 (*Indussa* rationale "appl[ies] with equal force in the case of a foreign arbitration clause in a bill of lading").

On the other side of the coin, numerous federal courts have upheld foreign arbitration clauses in bills of lading subject to COGSA. *See, e.g., Nissho Iwai Amer. Corp.* v. *M/V Sea Bridge*, 1991 A.M.C. 2070 (D. Md. 1991); *Citrus Mktg. Bd.* v. *M/V Ecuadorian Reefer*, 754 F. Supp. 229 (D. Mass. 1990); *Travelers Indem., Co.* v. *M/V Mediterranean Star*, 1988 A.M.C. 2483 (S.D.N.Y. 1988); *Mid South Feeds, Inc.* v. *M/V Aqua Marine*, 1988 A.M.C. 437 (S.D. Ga. 1986); *Midland Tar Distillers, Inc.* v. *MIT Lotos*, 362 F. Supp. 1311, 1315 (S.D.N.Y. 1973); *Mitsubishi Shoji Kaisha Ltd.* v. *MS Galini*, 323 F. Supp. 79, 83-84 (S.D. Tex. 1971); *Kurt Orban Co.* v. *S/S Clymenia*, 318 F. Supp. 1387, 1390 (S.D.N.Y. 1970).

We join those courts upholding the validity of foreign arbitration clauses in bills of lading subject to COGSA. In reaching this result, we are guided by our belief that the FAA alone governs the validity of arbitration clauses, both foreign and domestic, and consequently removes them from the grasp of COGSA.[5]

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[5] We recognize, however, that absent the FAA, COGSA might operate to nullify foreign arbitration clauses in bills of lading.

We begin with two canons of statutory interpretation. First, a later enacted statute generally limits the scope of an earlier statute if the two laws conflict. *Davis* v. *United States*, 716 F.2d 418, 428 (7th Cir. 1983); *Tennessee Gas Pipeline Co.* v. *Federal Energy Regulatory Comm'n*, 626 F.2d 1020, 1022 (D.C. Cir. 1980); *Indussa*, 377 F.2d at 204 n.4;[6] *see generally* 2B Norman J. Singer, *Sutherland*

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[6] Footnote four of *Indussa* states:

> Our ruling does not touch the question of arbitration clauses in bills of lading which require this to be held abroad. The validity of such a clause in a charter party, or in a bill of lading effectively incorporating such a clause in a charter party, have been frequently sustained. Although the Federal Arbitration Act adopted in 1925 validated a written arbitration provision "in any maritime transaction," § 2, and defined that phrase to include "bills of lading of water carriers," § 1. COGSA, enacted in 1936, made no reference to that form of procedure. *If there be any inconsistency between the two acts, presumably the Arbitration Act would prevail by virtue of its reenactment as positive law in 1947.*

Indussa, 377 F.2d at 204 n.4 (citations omitted) (emphasis added). Although a later Second Circuit opinion sought to narrow the scope of this dictum, *see Aaacon Auto Transp. Co.* v. *State Farm Mut. Auto Ins. Co.*, 537 F.2d 648, 655 (2d Cir. 1976) (explaining that footnote four of *Indussa* was concerned "primarily . . . upon those commercial situations in which the economic strength and bargaining power of the parties is roughly equal"), courts have continued to rely on footnote four in enforcing foreign arbitration clauses in bills of lading governed by COGSA. *See Fakieh Poultry Farms* v. *M/V Mulheim*, No. 85 Civ. 26577, slip op. at 2 (S.D.N.Y. Oct. 24, 1986); *M/V Mediterranean Star*, 1988 A.M.C. at 2484-85; *see also Kaystone Chem., Inc.* v. *Bow-Sun*, 1989 A.M.C. 2976, 2981-82 (S.D.N.Y. 1989) (stating that *Indussa* footnote "probably" requires enforcement of foreign arbitration clause in COGSA bill of lading). *But see Siderius*, 613 F. Supp.

Statutory Construction § 51.03 at 141 (5th ed. 1992). Second, where two statutes conflict, regardless of the priority of enactment, the specific statute ordinarily controls the general. *See Watson* v. *Fraternal Order of Eagles*, 915 F.2d 235, 240 (6th Cir. 1990); *see generally* 2B *Sutherland Statutory Construction*, § 51.05 at 174.

With respect to the former canon, the FAA must be given priority over COGSA in light of the FAA's reenactment in 1947, eleven years after COGSA was passed. Similarly, the latter canon suggests that the FAA be given effect. Section 3(8) of COGSA, which voids any clause in a bill of lading that "lessens" the carrier's liability, makes no reference to arbitration, or for that matter, forum selection clauses.[7] Conversely, the FAA specifically validates arbitration clauses contained in maritime bills of lading. *See* 9 U.S.C. §§ 1, 2.

Next, and perhaps of paramount importance, we believe that the strong federal policy favoring arbitration supports the primacy of the FAA over COGSA where arbitration agreements are concerned. *See Ecuadorian Reefer*, 754 F. Supp. at 233-34. The existence of this policy distinguishes the present case from foreign choice-of-forum cases because in those cases "there was no compelling congressional mandate

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at 920-21 (holding *Aaacon* substantially undercuts scope of the *Indussa* footnote); *Khalij Frost*, 1989 A.M.C. at 1463-64 (same). While we agree with the rule of statutory construction expressed in the footnote, we take no position on the effect of *Aaacon* on that note.

[7] In fact, up until *Indussa*, the Second Circuit regularly enforced foreign forum selection clauses in bills of lading governed by COGSA. *See, e.g., William H. Muller & Co.* v. *Swedish Amer. Line Ltd.*, 224 F.2d 806 (2d Cir.), *cert. denied*, 350 U.S. 903 (1955); *Cerro de Pasco Copper Corp.* v. *Knut Knutsen, O.A.S.*, 187 F.2d 990 (2d Cir. 1951).

in favor of giving effect to agreements to litigate before foreign tribunals." *MS Galini*, 323 F. Supp. at 83.

Furthermore, American courts' mistrust of foreign courts, a driving force in the *Indussa* court's decision to invalidate foreign choice-of-forum clauses, is an inappropriate consideration in the context of arbitration. *See Mitsubishi Motors*, 473 U.S. at 626-27 (We are "well past the time when judicial suspicion of . . . arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."); *Connolly*, 883 F.2d at 1119 ("[C]ourts must be on guard for artifices in which the ancient suspicion of arbitration might reappear."). Finally, unlike a foreign forum selection clause, an agreement to arbitrate does not deprive a federal court of its jurisdiction over the underlying dispute. *S/S Clymenia*, 318 F. Supp. at 1390; *MS Galini*, 323 F. Supp. at 83.

For the foregoing reasons, the order of the district court is *Affirmed*.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

VIMAR SEGUROS Y REASEGUROS, S.A. AND BACCHUS ASSOCIATES	)	
PLAINTIFFS,	)	
v.	)	C.A. No. 91-13345 WF
M/V SKY REEFER, HER ENGINES, ETC. AND M.H. MARITIMA, S.A.	)	
DEFENDANT.	)	

MEMORANDUM & ORDER

WOLF, D.J. April 19, 1993

Plaintiffs brought this action, *in rem*, against the defendant vessel, the Sky Reefer, and *in personam* against its owner, M.H Maritima, S.A. ("Maritima") to recover for damage to plaintiff Bacchus Associates' cargo of fruit. The fruit allegedly was spoiled during its transport aboard the Sky Reefer from Agadir, Morocco to New Bedford, Massachusetts in early 1991. Defendants have filed a motion to stay this proceeding and to compel arbitration in Tokyo, Japan pursuant to an arbitration clause contained in the Bill of Lading under which the fruit was shipped.

Plaintiff opposes this motion, and claims that it cannot be bound by the Bill of Lading's arbitration clause, arguing that the arbitration clause violates the United States Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. § 1300 *et seq.*,

and that it constitutes an unenforceable contract term of adhesion, to which plaintiff did not consent. Plaintiff further argues that the arbitration clause should not be enforced because it would impermissibly oust this Court's *in rem* jurisdiction over the vessel, and because it would be "grossly unfair and prejudicial to the plaintiffs for this court to refer this action, for which virtually all the evidence is located in the United States, to a forum so remote and inconvenient as Tokyo . . . ." Plaintiff's Memorandum in Opposition to Defendant's Motion to Stay Pending Arbitration ("Plaintiff's Memorandum") at 2. For the reasons stated below, plaintiff's motion to stay pending arbitration must be granted, pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* (the "FAA"). At this time, however, defendant's request for an order compelling arbitration, pursuant to 9 U.S.C. § 4, is premature and will be denied.

A. *Stay Pending Arbitration*

There is no dispute that plaintiff Bacchus' cargo was shipped pursuant to a Bill of Lading issued to plaintiff, dated February 8, 1991. Complaint ¶ 2; Memorandum in Support of Motion to Compel Arbitration and to Stay Proceedings Pending Arbitration ("Defendant's Memorandum") at 2. Plaintiffs themselves contend that the Bill of Lading "became the contract of carriage between Bacchus, the consignee of the cargo in the United States, and Maritima, the vessel owner . . . ." That Bill of Lading contains the following arbitration clause:

> **Governing Law and Arbitration**
>
> (1) The contract evidenced by or contained in this Bill of Lading shall be governed by Japanese Law.[1]

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[1] The parties do not dispute that this court should apply the laws of the United States to determine the validity of the arbitration clause and its effect. This is consistent with the COGSA, 46

(2) Any dispute arising from this Bill of Lading shall be referred to arbitration in Tokyo by the Tokyo Maritime Arbitration Commission (TOMAC) at the Japan Shipping Exchange, Inc., in accordance with the Rules of TOMAC and any amendment thereto, and the award given by the arbitrators shall be final and binding on both parties.

Plaintiffs' Memorandum Exh. 1.

Section 2 of the FAA provides,

"A written provision in any maritime transaction . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

9 U.S.C. § 2. Bills of lading are specifically included within the definition of "maritime transactions" under the Act. 9 U.S.C. § 1. Once a court determines that parties to a dispute are bound by an arbitration clause covering that dispute, that court is required by the FAA, upon application of one of the parties, to stay litigation until arbitration has been completed, in accordance with the parties' agreement. 9 U.S.C. § 3.[2]

U.S.C. §§ 1300 *et seq.*, and with the Bill of Lading, which contemplates that goods shipped to or from the United States will be subject to United States law. *See* Bill of Lading, appended to Defendant's Memorandum as Exhibit A, at ¶ 19.

[2] The FAA also specifically contemplates that the court will retain its *in rem* jurisdiction over a seized vessel pending arbitration, and may enter the award of the arbitrator pursuant to that *in rem* jurisdiction. 9 U.S.C. § 8; *see The Anaconda v. American Sugar Refining Co.*, 322 U.S. 42, 44 (1944); *Paramount Carriers Corp. v. Cook Industries, Inc.*, 465 F. Supp. 599 (S.D.N.Y. 1979). Therefore, plaintiffs' argument that the arbitration clause at issue impermissibly ousts this court's

Plaintiffs' arguments that the arbitration clause is void or invalid lack merit. First, plaintiff contends that the arbitration clause is invalid because it violates COGSA.[3] Specifically, plaintiff asserts that the foreign arbitration clause is invalidated by § 1303(8) of COGSA, which nullifies any provision in a contract of carriage purporting to relieve or lessen the liability of the carrier or ship for loss or damage to cargo. Plaintiff argues that the arbitration clause, calling for arbitration in Japan, violates § 1303(8) of COGSA because it will lessen the defendant's liability for the damage to plaintiff's fruit.

This argument was thoroughly considered and soundly rejected by this district in a strikingly similar case, *Citrus Marketing Board of Israel v. M/V Ecuadorian Reefer*, 754 F. Supp. 229 (D. Mass. 1990). In that case, relying on the Supreme Court's interpretation of the FAA in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the court held that, given the strong federal policy favoring arbitration of disputes arising out of international commerce, an arbitration clause incorporated into a bill of lading was enforceable and did not conflict with COGSA. In a well-reasoned opinion, the court rejected the contrary holdings of two other courts, *State Establishment for Agricultural Product Trading v. M/V Wesermunde*, 838 F.2d 1576 (11th Cir. 1988) and *Organes Enterprises, Inc. v. The M/V Khalij Frost*, 1989 AMC 1460 (S.D.N.Y. 1989) (finding that arbitration clauses in bills of lading, calling for arbitration in a foreign jurisdiction are unenforceable because

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jurisdiction is unavailing.

[3] For the purposes of this motion the parties do not dispute that COGSA regulates their shipping contract, since the bill of lading at issue "is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade." 46 U.S.C. § 1300

bills of lading are adhesion contracts and such arbitration clauses violate COGSA). The court pointed out that the cases denying enforcement of arbitration clauses did so without proper regard for the Supreme Court's mandate that lower courts discard their historical distrust of arbitrators, and give effect to private agreements to submit their disputes to private dispute resolution tribunals. *See Ecuadorian Reefer,* 754 F. Supp. at 233 (D. Mass. 1990); *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 481 (1989) (discussing the Court's strong endorsement of federal statutes favoring arbitration, and setting aside the outmoded presumption of disfavoring arbitration); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)(holding that FAA requires vigorous enforcement of agreements to arbitrate); *Securities Industry Association v. Connolly*, 883 F.2d 1114, 1119 (1st Cir. 1989) (discussing Supreme Court's strong pronouncements in favor of arbitration, and stressing that "courts must be on guard for artifices in which the ancient suspicion of arbitration might reappear").

This court finds the analysis in *Ecuadorian Reefer* to be persuasive, particularly in light of the fact that the FAA, which was reenacted after the promulgation of COGSA, specifically refers to bills of lading in defining the types of agreements which might contain valid and irrevocable arbitration clauses. 9 U.S.C. §§ 1, 2; *see Indussa v. Ranborg* 377 F.2d 200, 204 n.4 (2d Cir. 1967) (Friendly, J.) (noting that FAA was reenacted after COGSA, and therefore prevails in the event of conflicting provisions). Given the strong endorsement by Congress and the President of arbitration in maritime transactions, there is no basis for finding that requiring the parties to honor the arbitration clause in the bill of lading and submit to arbitration in Tokyo would impermissibly lessen the liability of defendants, in contravention of COGSA.

The court is also not persuaded by plaintiffs' argument that the arbitration is unenforceable because it constitutes a

term of adhesion. In their reply brief, plaintiffs argue that the district court in *Ecuadorian Reefer* did not adequately consider § 2 of the FAA which provides that a court may decline to enforce an arbitration clause, "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. While this court does not reject the general proposition that an adhesional arbitration clause would be unenforceable under the FAA, plaintiffs have not here demonstrated that the arbitration clause found in the Bill of Lading constitutes such an adhesional term.

Plaintiff Bacchus Associates ("Bacchus") is an importer/wholesaler of fruit throughout New England. Affidavit of Edward T. McArdle ¶ 4. Plaintiff is evidently neither unsophisticated and unfamiliar with the negotiation of maritime shipping transactions, nor a party of relatively weak bargaining power. In fact, the record shows that plaintiff engaged in serious and successful negotiations with a third party -- the time charterer -- relating to the shipping of the cargo in question. More specifically, Bacchus negotiated in Morocco a charter party contract with the charterer that issued the relevant Bill of Lading. Defendant's Reply in Support of Motion to Compel Arbitration, Exh. A. That contract included an arbitration clause calling for arbitration in London.[4] *Id.* This suggests that Bacchus was alert to the issue of arbitration and was generally capable of representing its interests in negotiations on this issue.

More importantly, in light of the plain language of the FAA, this court is not persuaded by the cases cited by plaintiffs which suggest that bills of lading generally constitute contracts of adhesion, and which, on that basis,

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[4] Since the defendants in this case are not parties to the charter party contract, they are not subject to the London arbitration clause, and this court is not faced with conflicting arbitration provisions.

refuse to honor arbitration clauses contained therein.[5] As noted earlier, Congress and the President specifically included maritime bills of lading among the types of contracts whose arbitration clauses are to be enforced under the FAA. 9 U.S.C. § 1. This provision is, in effect, a statutory determination that arbitration clauses in maritime bills of lading are not adhesional *per se* or generally invalid. In view of this statute, the claim that bills of lading are inherently adhesional, because they generally are not subject to bargaining, is an argument which should be directed to Congress and the President, rather than to the courts.

Moreover, even if this court did find that the Bill of Lading constituted a contract of adhesion, that would not be tantamount to finding the arbitration clause unenforceable. In Massachusetts, contracts of adhesion are not unenforceable unless they are also unconscionable. *See Santos v. Lumbermens Mutual Casualty Co.*, 408 Mass. 70, 86 (1990); *Lechmere Tire & Sales Co. v. Burwick*, 360 Mass. 718, 720-21 (1972); *Greenwood Trust Co. v. Commonwealth of Massachusetts*, 776 F. Supp. 21, 40-41 (D. Mass. 1991).[6] The court finds that, despite posing some inconvenience to

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[5] *See, e.g., Organes Enterprises Inc. v. The M/V Khalij Frost*, 1989 AMC 1460; *State Establishment for Agriculture Product Trading v. M/V Wesermunde*, 838 F.2d at 1582; *Pacific Lumber & Shipping Co. Inc., v. Star Shipping A/S*, 464 F. Supp. 1314, 1315 (N.D. Wash. 1979).

[6] When deciding whether a contract to arbitrate is invalid, voidable or unenforceable "upon such grounds as exist at law or equity for the revocation of any contract" federal courts must apply state law principles, when those principles address the validity and enforceability of contracts generally. *See Perry v. Thomas*, 482 U.S. 483, 492-93 n.9 (1986). Therefore, Massachusetts contracts law determines in this case whether the arbitration clause in the Bill of Lading is unenforceable as a contract of adhesion.

plaintiffs, the arbitration clause in the Bill of lading is not unconscionable.

In their memoranda, plaintiffs proffer arguments which essentially assert unconscionability, contending that the arbitration clause is unfair, one-sided, and grossly inconvenient to plaintiffs. Plaintiffs complain that the proceedings in Japan will not be conducted in English, that a Japanese arbitrator will favor the defendant, which is a Japanese Corporation, and that the arbitrator will not apply the pertinent law. *See* Plaintiffs' Memorandum at 16-18; Plaintiffs' Surreply Memorandum at 6-7. Plaintiff's arguments suggesting bias on the part of the arbitrator, or incompetence to discern and correctly apply the governing law, amount to no more than an attempt to arouse parochial distrust of foreign tribunals and the arbitration process. However, as pointed out in *Ecuadorian Reefer*, Congress and the Supreme Court have instructed that such suspicions must now be set aside. 754 F. Supp. at 233; *Rodriguez de Quijas* 490 U.S. at 481.

Furthermore, the inconvenience to plaintiffs of having to participate in arbitration in Japan does not vitiate the otherwise valid arbitration clause. Plaintiffs claim damages in excess of $1,000,000. Plaintiffs have not demonstrated that having to take their case to Japan will prove so costly, relative to their claim, that they will effectively be deprived of a meaningful opportunity to seek redress for their alleged damages. *See Fireman's Fund American Ins. Co. v. Puerto Rican Forwarding Co.*, 493 F.2d 1294, 1297 (1st Cir. 1974) (suggesting that a choice-of-forum might be avoided by a party showing "such serious inconvenience in litigating in the selected forum that it is effectively deprived of its day in court").

Moreover, since defendant is a Japanese corporation, litigation in this court would arguably prove as inconvenient to defendant as arbitration in Japan will be to plaintiff. As

aptly articulated in defendant's brief, "[t]he world of international commercial transactions often imposes inconvenience on one party or another. Certainly . . . someone will be forced to travel . . ." Defendant's Reply Memorandum at 8. Here, plaintiffs have asserted claims based on a Bill of Lading which contains an arbitration clause requiring arbitration in Japan. Pursuant to the FAA, plaintiffs must arbitrate in Japan if they wish to seek relief in this dispute.

While the court must stay this litigation pending arbitration, under 9 U.S.C. § 3, the defendant has not demonstrated that an order compelling arbitration, pursuant to § 4, would be appropriate at this time. Defendant has not demonstrated that the plaintiff will refuse to arbitrate. Plaintiffs' opposition to defendant's motion to stay litigation was based on a reasonable dispute about the validity of the arbitration clause. This Memorandum and Order resolves the enforceability of the arbitration clause, and this court expects that plaintiffs will proceed to arbitration in the manner described in the Bill of lading. At this time, however, it would be premature to issue an injunction as prescribed by the FAA, since defendant is not yet "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate." 9 U.S.C. § 4. The denial of defendant's request for an Order compelling arbitration is, however, without prejudice to reconsideration if plaintiffs prove unwilling to comply with the arbitration clause in the governing Bill of Lading.

B. *Plaintiffs' Request for Certification Under 28 U.S.C. § 1292(b)*

In their opposition to defendant's motion, plaintiffs request that this court certify this Order for immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b).[7]

[7] 28 U.S.C. § 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable . . . shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation, he shall so state in writing in such order. The Court or Appeals . . . may thereupon, in its discretion, permit an appeal to be taken from such order . . . ."

Plaintiffs' request for certification was not made by motion and was raised for the first time in their Surreply Memorandum, to which Defendant has not responded, having previously filed a Memorandum and Reply Memorandum in support of its motions to stay litigation and compel arbitration. For this reason, and because certification may delay final resolution of this case, causing prejudice to the defendant, the court will deny plaintiffs' request for certification at this time, without prejudice to possible reconsideration upon a motion and memoranda timely filed.

28 U.S.C. § 1292(b) establishes three conditions for certification of an interlocutory appeal. The order must involve a question of law (1) which is "controlling;" (2) as to which there is substantial ground for difference of opinion; and (3) whose immediate determination "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

In this case, this Order should be regarded as "controlling" because it requires that the dispute be referred to another tribunal for decision. Furthermore, the principle point of contention between the parties, namely whether enforcement of the arbitration clause at issue violates COGSA, is a question about which courts have disagreed. *Compare Ecuadorian Reefer*, 754 F. Supp. 229; *Kaystone Chemical v. Bow-Sun*, No. 88-5859, 1989 U.S. Dist. LEXIS 4384 (S.D.N.Y. April 19, 1989); *Nissho Iwai American*

Corp., v. M/V Sea Bridge, R-90-1238, 1991 WL 182117 (D. Md. April 25, 1991) *with State Establishment for Agricultural Product Trading v. M/V Wesermunde*, 838 F.2d 1576; *Organes Enterprises Inc. v. The M/V Khalij Frost*, 1989 AMC 1460; *Pacific Lumber & Shipping Co. Inc., v. Star Shipping A/S*, 464 F. Supp. 1314, 1315 (W.D. Wash. 1979). The Court of Appeals for the First Circuit has not yet decided this issue. Therefore, this Order implicates a question of law as to which there is substantial ground for difference of opinion, within the meaning of 28 U.S.C. § 1292(b).

However, as this court has explained previously, § 1292(b) constitutes "the statutory language equivalent of a direction to consider the probable gains and losses of immediate appeal." *United States of America ex rel. Harold LaValley v. First National Bank of Boston*, No. 86-236WF, 1990 U.S. Dist. LEXIS 9913 at *10 (D. Mass. July 30, 1990). This court is sensitive to plaintiffs' concern that submitting to arbitration in Tokyo will prove costly, and appreciates plaintiffs' desire to seek review by the Court of Appeals for the First Circuit prior to incurring that expense. On the other hand, pursuing an appeal may result in further delay of the final disposition of this action, which may prove prejudicial to defendant Maritima.[8] Furthermore, reversal of this Order by the Court of Appeals would not bring this action to a close; it would merely reinvigorate the litigation of this controversy in federal court.

Moreover, certifying this case for appeal nay result in costly delay of arbitration without resulting in an authoritative ruling from the Court of Appeals. The First Circuit has warned that the occasions warranting its interlocutory review

[8] Apparently, the costs associated with delaying arbitration persuaded Congress to amend the FAA in 1988 to provide that Orders staying litigation and compelling arbitration are not subject to interlocutory appeal, absent certification. 9 U.S.C. § 16(b).

pursuant to § 1292(b) certification "will, realistically, be few and far between." *In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1010 n.1 (1st Cir. 1988). The party seeking interlocutory appeal under § 1292 bears the heavy burden of persuading the court that exceptional circumstances warrant "'departure from the basic policy of postponing appellate review until after entry of a final judgment.'" *Bank of New York v. Hoyt*, 108 F.R.D. 184, 190 (D.R.I. 1985) *quoting Fisons Ltd. v. United States*, 458 F.2d 1241, 1248 (7th Cir.), *cert. denied*, 405 U.S. 1041 (1972); *see also McGillicuddy v. Clements*, 746 F.2d 76, 76 n.1 (1st Cir. 1984) (admonishing that interlocutory certification "should be used sparingly and only in exceptional circumstances"). Particularly since Congress specifically has mandated a presumption against immediate appellate review of orders staying litigation under the FAA, § 1292(b) certification of such orders should be granted upon careful review and only in extraordinary circumstances. *See* 9 U.S.C. § 16(b). Plaintiff has not met its burden of demonstrating that this order warrants certification. Furthermore, defendant has not had an adequate opportunity to state its opposition, if any, to plaintiffs' request for certification. For these reasons, plaintiffs' request will be denied, without prejudice to reconsideration upon a motion timely filed.

ORDER

For the foregoing reasons, it is hereby ORDERED that:

1. Defendant's motion to stay this action pending arbitration, pursuant to 9 U.S.C. § 3, is ALLOWED.

2. Defendant's motion for an Order compelling arbitration, pursuant to 9 U.S.C. § 4 is DENIED without prejudice.

3. Plaintiffs' request for certification of this Order for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b) is

DENIED without prejudice to reconsideration, should plaintiffs file by May 10, 1993 a motion and supporting memorandum requesting such reconsideration. Defendant shall by May 23, 1993 file a response to any such motion for reconsideration.

/S/ MARK L. WOLF
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

VIMAR SEGUROS Y REASEGUROS, S.A. AND BACCHUS ASSOCIATES	)	
PLAINTIFFS,	)	
v.	)	C.A. No. 91-13345 WF
M/V SKY REEFER, HER ENGINES, ETC. AND M.H. MARITIMA, S.A.	)	
DEFENDANTS.	)	

ORDER

WOLF, D.J. July 22, 1993

On April 19, 1993, this court issued a Memorandum and Order ("Memorandum & Order") staying litigation of this matter pending arbitration, pursuant to 9 U.S.C. § 3. The court rejected Plaintiffs' contention, made in opposition to Defendants' motion to stay, that the arbitration clause contained in the Bill of Lading governing this dispute was unenforceable. Specifically, this court held that the arbitration clause at issue was not void as violative of the United States Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. § 1300 *et seq*. Memorandum & Order at 4-6.

In their Surreply Memorandum in Opposition to Defendant's Motion to Compel Arbitration, Plaintiffs requested that any order staying litigation be certified for immediate interlocutory appeal, pursuant to 28 U.S.C. § 1292(b). This request was not made by motion, and

Defendants had not been afforded an opportunity to respond as of the time of this court's ruling. Largely for that reason, the court denied Plaintiffs' request for certification, but did so without prejudice to reconsideration upon a notion timely filed. Memorandum & Order at 11-14. Plaintiffs subsequently filed a motion for reconsideration, accompanied by memoranda, to which Defendants have responded. Upon consideration of these filings, and further reflection on the motion, the court will certify for immediate appeal the controlling question of whether COGSA precludes enforcement of the arbitration clause at issue in this case.

As was previously noted on page 12 of the Memorandum & Order, whether the arbitration clause violates COGSA is a "controlling question of law" under § 1292(b). Furthermore, it is a question as to which there is substantial ground for difference of opinion. Memorandum & Order at 12. In fact, this court's ruling on the issue ran contrary to the decision by the United States Court of appeals for the Eleventh Circuit in *State Establishment for Agricultural Product Trading v. M/V Wesermunde*, 838 F.2d 1576 (11th Cir. 1988).

The court is aware of the strong public policy against interlocutory appeals of orders enforcing arbitration clauses. *See* 9 U.S.C. § 16(b); *USM Corp. v. GKN Fasteners, Ltd.*, 574 F.2d 17, 20 (1st Cir. 1978); *Corion Corn. v. Chen*, 964 F.2d 55, 59 (1st Cir. 1992). The court is also mindful that interlocutory certification generally "should be used sparingly and only in exceptional circumstances." *McGillicuddy v. Clements*, 746 F.2d 76, 76 n.1 (1st Cir. 1984).

However, the precise issue that this court certifies for interlocutory appeal, whether foreign arbitration clauses in bills of lading are void under § 1303(8) of COGSA, is a question of statutory interpretation which is not fact-specific, and is particularly well-suited to immediate appellate review. It involves a serious legal issue, on which courts have disagreed, which doubtless will arise in future cases. *See*

S.A. Mineracao Da Tinidade-Samitri v. Utah International, Inc., 579 F. Supp. 1049, 1050 (S.D.N.Y. 1984), *aff'd*, 745 F.2d 190 (2d Cir. 1984) (certifying for appeal order compelling arbitration, where controlling issue was not fact-specific, would arise repeatedly, and where decision on appeal would help clarify murky area of the law). A decision by the Court of Appeals in this case will provide more certainty to, and therefore less delay in, the process of resolving maritime shipping disputes. Because the issue on certification is narrowly tailored to the COGSA question, certification here will not invite certification motions by parties seeking to forestall arbitration in future cases not involving COGSA. For these reasons, certification here is not inconsistent with the strong federal policies of honoring arbitration clauses and promoting speedy resolution of commercial disputes.

Furthermore, the court now agrees with plaintiffs that immediate appeal may materially advance the ultimate termination of this litigation. If the Court of Appeals finds that COGSA prohibits enforcement of the arbitration clause in this case, the parties will be spared the expense of arbitration in Japan, which, given the location of the Plaintiffs and several potential witnesses, could prove considerably costly. *See Banner Industries v. Central States, Southeast and Southwest Areas Pension Fund*, 663 F. Supp. 1290, 1291 (N.D. Ill. 1987), *aff'd*, 875 F.2d 1285 (7th Cir. 1987) (certifying decision referring dispute to arbitration); *Trinadade-Samitri*, 579 F. Supp. at 1051. Finally, Defendants have not demonstrated that the costs associated with immediate appeal would be unduly prejudicial, as compared with the expense and potential waste associated with pursuing arbitration in Japan, which may later be invalidated.

Accordingly, this court hereby amends its Memorandum and Order dated April 19, 1993 and certifies for immediate appeal to the Court of Appeals for the First Circuit, pursuant

to 28 U.S.C. § 1292(b), the question whether 46 U.S.C. 1303(8) nullifies an arbitration clause contained in a bill of lading governed by COGSA.

/S/ MARK L. WOLF
UNITED STATES DISTRICT JUDGE